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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

BRUCE H. GREENFIELD, individually and as a representative of a class of persons similarly situated,

Petitioner,

v.

HEUBLEIN, INC.,

and

R. J. REYNOLDS INDUSTRIES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that a publicly held takeover target did not violate its duty, under Sections 10(b) and 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. §§78;(b) and 78n(e), to speak the whole truth and not mislead when it stated it was "aware of no reason for the activity in its stock in trading on the NYSE today", when:

(i) the statement responded to an inquiry from the New York Stock Exchange about whether the takeover target was aware of any reason that could explain the extraordinary trading in its stock;

(ii) the takeover target knew of at least two ongoing negotiations which could have explained the extraordinary trading activity; and

(iii) the takeover target made no investigation into the possibility that information had been leaked?

2. Did the Court of Appeals err in holding that there could never be a duty to disclose an agreement to merge until the parties agreed on price and the structure of the transaction, even when these factors were of secondary importance in a particular transaction and there had been agreement on all the significant terms?

3. Did the Court of Appeals err by disregarding this Court's opinion in TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976), and holding that the materiality of an event, and thus the duty to disclose it, was to be determined from the perspective of the company rather than the perspective of the reasonable shareholder?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES.	v
Cases Cited	v
Statutory Provisions.	vii
OPINIONS BELOW	2
JURISDICTION.	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	13
I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE CIRCUITS OVER THE DUTY TO SPEAK THE WHOLE TRUTH AND NOT MISLEAD . .	14
II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE IMPORTANT QUESTIONS OF WHEN A DUTY TO DISCLOSE ARISES UNDER THE SECURITIES EXCHANGE ACT OF 1934	27
A. A Duty of Disclosure Exists When The Parties Have Reached Agreement On The Elements Crucial To A Particular Transaction	29

TABLE OF CONTENTS

PAGE

B. The Panel Misapplied this Court's Decision In TSC v. Northway That the Materiality of An Event, And Thus The Duty To Disclose, Should Be Determined From The Shareholders' Perspective . . . 33

CONCLUSION 36

CERTIFICATE OF SERVICE

APPENDIX: [Separate Volume]

A - Opinion of the Court of Appeals A1

B - Memorandum and Order of the District Court Granting Defendants' Motion for Summary Judgment A34

C - Judgment of the Court of Appeals A95

D - Order of the Court of Appeals In Banc Denying Appellant's Petition for Rehearing. A97

E - 15 U.S.C. §78j(b). A99

F - 17 C.F.R. §240.105b-5. . . . A100

G - 15 U.S.C. §78n(e). A101

TABLE OF AUTHORITIES

CASES:	PAGE
Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773 (S.D.N.Y. 1979). .	33
Connellan v. Himelhock, 506 F. Supp. 1290 (E.D. Mich. 1981)	20
Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976)	31
First Virginia Bankshares v. Benson, 559 F.2d 1307 (5th Cir. 1977), cert. denied sub nom., Walter E. Heller & Co. v. First Virginia Bankshares, 435 U.S. 952 (1978)	19
Greenfield v. Heublein, Inc., 742 F.2d 781 (3d Cir. 1984)	2
Greenfield v. Heublein, Inc., 575 F. Supp. 1325 (E.D. Pa. 1983)	2, 30
Herman & McLean v. Huddleston, -- U.S. --, 103 S. Ct. 683 (1983).	31
Kubic v. Goldfield, 479 F.2d 472 (3d Cir. 1973)	18

TABLE OF AUTHORITIES

CASES: PAGE

List v. Fashion Park, 340 F.2d 457 (2d Cir. 1965) . . . 19

Lurero v. Banco di Roma (Chicago), 487 F. Supp. 568 (E.D. La. 1980) 20

Mitchell v. Texas Gulf Sulphur Co., 446 F.2d 90 (10th Cir.), cert. denied, 404 U.S. 1004 (1971) . . . 15, 22

Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir. 1981), cert. denied, 454 U.S. 1092 (1982). 19

Reiss v. Pan American World Airways Inc., 711 F.2d 11 (2d Cir. 1983). 28

Schlanger v. Four-Phase Systems, Inc., 582 F.Supp. 128 (S.D.N.Y. 1984) 21

SEC v. Capital Gains Research Bureau, 375 U.S. 180 (1963). . . . 30, 31

SEC v. Geon Industries, Inc., 531 F.2d 39 (2d Cir. 1976) 19

Smith v. Manuasa, 385 F. Supp. 443 (E.D. Ky. 1974). . 20

Speed v. Transamerica Corp., 99 F. Supp. 808 (D. Del. 1951), aff'd with mod., 235 F.2d 369 (3d Cir. 1956). 21

TABLE OF AUTHORITIES

CASES:	PAGE
Staffin v. Greenberg, 672 F.2d 1196 (3d Cir. 1981). . . .	28
TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976).	14, 33, 34
STATUTES:	
15 U.S.C. §78aa	4
§78j(b)	3
§78n(e)	3
§77(q).	17
28 U.S.C. §1254(1).	3
Rule 10b-5, 17 C.F.R. §240.10b-5. . .	3
LEGISLATIVE HISTORY	
H.R. Rep. No. 85, 73d Cong., 1st Sess. 1-5 (1933).	30
OTHER AUTHORITIES:	
NYSE-Company Manual, Section A2 Part I, Timely Disclosure: Exchange Market Surveillance (1977).	22, 24
5A Jacobs, Litigation and Practice Under Rule 10b-5, §61.01[a], at 3-6 to 3-7 (1984).	17
§61.01[c] [vi] at 3-71 to 3-74 .	17

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Bruce H. Greenfield ("Greenfield"), individually and as a representative of a class of persons similarly situated, prays that a Writ of Certiorari issue to review the August 29, 1984 Opinion and Judgment of the United States Court of Appeals for the Third Circuit ("Third Circuit").

OPINIONS BELOW

The United States District Court for the Eastern District of Pennsylvania granted Respondents' Motion For Summary Judgment on October 20, 1983. Judge Newcomer's Memorandum and Order are reported at 575 F.Supp. 1325 (E.D.Pa. 1984). Appendix "B", at A34. (References to the Appendix are cited as "A ___"). A panel of the Third Circuit affirmed over a dissent by the Hon. A. Leon Higginbotham, Jr. Greenfield v. Heublein, Inc., 742 F.2d 751 (3d Cir. 1984); Appendix "A", at A1. The Third Circuit denied a timely Petition for Rehearing In Banc, with Judge Higginbotham again dissenting. The Order denying the Petition for Rehearing is set forth as Appendix "D", at A97.

JURISDICTION

The Third Circuit entered judgment affirming the district court on August 29, 1984. Appendix "C", at A95. A timely

Petition for Rehearing In Banc was filed on September 11, 1984, and denied by the Third Circuit In Banc on October 1, 1984. Appendix "D", at A97. The jurisdiction of this Court is invoked under 28 U.S.C §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 15 U.S.C. §§78j(b) and 78n(e), are set out in Appendices "E" and "G", at A99 and A101. Rule 10b-5, 17 C.F.R. §240.10b-5, is set out in Appendix "F", at A100.

STATEMENT OF THE CASE

Petitioner in this class action alleges violations of §§10(b) and 14(e) of the Securities Act of 1934, 15 U.S.C. §§78j(b) and 78n(e) [the "1934 Act"], Rule 10b-5, 17 C.F.R. §240.10b-5, and the common law. Greenfield sued on behalf of a class composed of all persons who sold Heublein, Inc. ("Heublein"), common stock in the period from July 15 through July 28, 1982.

The class sold 1,842,200 shares and lost approximately $28,000,000. The defendants below were Heublein and R. J. Reynolds Industries, Inc. ("Reynolds").[1] Federal jurisdiction below was based on § 27 of the 1934 Act, 15 U.S.C. §78aa.

Heublein was the target of a hostile takeover attempt by General Cinema Corp. ("General Cinema"). By May 28, 1982, when General Cinema amended its Schedule 13D filed with the Securities and Exchange Commission to state that it had no present intention of purchasing additional Heublein shares, General Cinema had invested $157,000,000 and held approximately 18.9% of the outstanding Heublein shares. In response to General Cinema's attack, Heublein began friendly merger discussions with

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[1] A third defendant, R.J. Reynolds Tobacco Co., was dropped by agreement of the parties.

Reynolds which had independently formed an interest in becoming Heublein's "White Knight" and acquiring the company.

On Thursday, July 8, 1982, the situation facing Heublein changed radically when General Cinema confronted Heublein with "non-negotiable demands" that were entirely unacceptable to Heublein. Alarmed by this turn of events, Heublein hurriedly scheduled a meeting with Reynolds for July 9 to discuss "putting the two companies together". This meeting was attended by the top executives of each company: Reynold's Chairman, J. Paul Sticht; Heublein's Chairman, Stuart D. Watson; and Heublein's CEO, Hicks B. Waldron.

Heublein considered the July 9 meeting with Reynolds "a fairly important turn of events" and reported to Heublein's executive committee and its outside investment bankers "essentially what occurred". It

was reported that, among the points discussed and agreed, Waldron and Watson would become members of Reynold's board of directors and Waldron would become the head of a combined food division once Heublein and Reynolds merged. Heublein also instructed its investment banker to inform Heublein's outside counsel of these developments. On July 14, Reynolds' management committee was advised of the July 9 meeting with Heublein.

Heublein's desperation increased on July 14 when it learned that General Cinema was about to sell its Miami television station for approximately $100 million. This gave General Cinema the immediate financial capacity to resume large block acquisitions of Heublein's stock, "the one thing" Heublein "knew it could never defend against". In a call to Waldron confirming

the pending transaction, General Cinema impliedly threatened Heublein's independence.

In response, Heublein initiated "accelerated activity" on its remaining option and immediately set up another high level meeting with Sticht. Sticht detected desperation in Heublein's call and, due to the obvious "sense of urgency", agreed to fly to Connecticut the next evening after attending an important congressional hearing in Washington.

At the July 9 and July 15 meetings, the issues critical to Heublein's management were reviewed, negotiated and agreed upon: Heublein was to receive operational autonomy within Reynolds; its executives were to be provided with golden parachutes; Waldron was to become the head of a combined food division once Reynolds and Heublein merged;

and Waldron and Watson were to become members of Reynolds' board. Other less essential terms needed for a final agreement, the "nuts and bolts" such as price and structure, were by agreement left to the parties' lawyers and investment bankers.

While matters progressed between Heublein and its two suitors, there was a sudden and significant change in the market. On Tuesday, July 13, only 32,000 Heublein shares were traded. But, on Wednesday, July 14, 1982, approximately 242,500 Heublein shares were traded on the New York Stock Exchange ("NYSE"), and the stock rose 2-3/4 points. The NYSE called Heublein and inquired about what could have caused the sudden, dramatic surge in trading. Heublein through its General Counsel, George Caspar, Esquire, immediately responded that it was aware of nothing that

would have caused the increased trading; however, Caspar volunteered to check within Heublein to be certain. The NYSE requested that Heublein issue a "no corporate development" statement if it could or should.

Caspar, who had specific knowledge of the Reynolds and General Cinema developments, had not spoken to Waldron or Watson about the activity, gave no thought to consulting them, and made no effort to speak with them before replying. Caspar assumed, without inquiring, that no one at Heublein had leaked or disclosed information about the July 9 meeting, and gave no thought to whether Reynolds had leaked or disclosed such information, or to the effect the General Cinema situation might be having on the market.

After consulting persons who had not been involved in the July 9 meeting, Caspar

called the NYSE and read the following statement which was duly publicized:

> In response to a request from the New York Stock Exchange, Heublein said it's aware of no reason for the activity in its stock today.

Greenfield learned of Heublein's statement and reasonably interpreted it to mean that all was normal at Heublein. Greenfield also concluded that Heublein's stock was fully priced and placed a market order with his broker that ultimately resulted in his stock being sold on July 27 for $45.25 per share, well below the merger price of approximately $60.00 per share announced on July 29.

While Greenfield was selling his stock in the falsely induced belief that it was "business as usual" at Heublein, Heublein was, in fact, resolving matters with both

General Cinema and Reynolds. Heublein knew that no accommodation would be reached with General Cinema and that a final deal with Reynolds would have to be struck quickly to prevent a resumption of block stock purchases by General Cinema. Only the final price and the "nuts and bolts" terms of the Heublein/Reynolds transaction had to be settled because Heublein had already obtained everything it had been seeking at the earlier meetings. Because price was not a key element, the top executives of Heublein and Reynolds did not participate in the meeting between the investment bankers on Monday, July 26. Both sides had internal reports which contemplated a transaction in the range of $55 to $65 per share,[2] but the bankers unexpectedly

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[2] Waldron and Watson both considered $60.00 per share to be "a hell of a price".

failed to reach an agreement on the actual price.[3] Accordingly, on Tuesday, July 27, the executives had another meeting to settle the remaining terms. The discussion on price remained within the anticipated range, and the parties eventually agreed to a composite price of $60.00 per share: the exact middle of the anticipated price range. On July 29, 1982, Reynolds and Heublein announced that a $1.25 billion merger had been approved by their boards of directors.

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[3] One possible explanation was that Heublein's investment banker, Frederick Krimendahl of Goldman Sachs, knew he was losing a major client and was unhappy with the transaction.

REASONS FOR GRANTING THE WRIT

This case raises important questions under the 1934 Act about two interrelated duties which arise in the context of corporate acquisitions: the duty to speak the whole truth and not mislead; and the duty to disclose.

Mergers, takeovers and other types of acquisitions have become a routine feature of American corporate life. A week rarely passes without a major announcement involving hundreds of millions of dollars and affecting thousands of public shareholders. Against this background, Greenfield urges this Court to grant the Writ for two reasons. First, the panel majority's decision is in direct conflict with other circuits regarding the duty to speak the whole truth and not mislead. Second, the opinion addresses important disclosure

issues under the 1934 Act which should be resolved by this Court in a manner consistent with its past decisions, particularly TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976), which the decision below contravenes.

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE CIRCUITS OVER THE DUTY TO SPEAK THE WHOLE TRUTH AND NOT MISLEAD

Prior to this decision, no court in the fifty years since the passage of the 1934 Act had ever limited the inquiry in a misrepresentation case to the literal truth of the statement at issue. The Third Circuit panel decision, which applied this novel, narrow test, is, therefore, in direct conflict with existing law in other circuits, and even with its own prior decisions, on the duty to speak the whole truth and not mislead.

The panel's opinion, by focusing on what was perceived to be the literal truth of

Heublein's statement, ignored both the false impression it deliberately created and the fact that the statement was, at best, a half truth. Judge Higginbotham in his dissent exposed the fallacy underlying this position:

> My disagreement with the majority opinion involves Heublein's breach of its duty not to mislead. This duty applies to any corporate statement reasonably calculated to influence the investing public whether or not a duty to disclose exist. Once Heublein opted, however, to issue a statement that was reasonably calculated to influence the public, the July 14 statement, Heublein was obligated to ensure that its statement was not "false or misleading or . . . so incomplete as to mislead." SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 862 (2d Cir. 1969), cert. denied, 349 U.S. 976 (1969). A21. [Footnote omitted.]

Mitchell v. Texas Gulf Sulphur Co., 446 F.2d 90 (10th Cir.), cert. denied,

404 U.S. 1004 (1971), highlights the error of the limited inquiry conducted by the majority below and confirms the soundness of Judge Higginbotham's dissent. In Mitchell, the Tenth Circuit articulated the standard under which the Heublein press release should have been judged, and concluded:

> The misleading, misrepresented or untruthful character of the release may appear from the nature of the statement alone, or, when the facts are fully disclosed, from the half truths' ommissions or absence of full candor concealed therein. 446 F.2d at 97.

Similarly, the leading commentator on Rule 10b-5 states that both false impressions and half truths are as actionable as outright misrepresentations under the Rule:

> A statement which conveys a false impression to a reasonable investor is a misrepresentation.
>
> A half truth is a statement which accurately discloses some facts, but misleads the listener or reader by

> concealing other data necessary for the true understanding. . . .half truths are usually more difficult to detect than outright lies. . . .
>
> Clause (2) of [Rule 10b-5] prohibits both misrepresentations and half truths, . . .

5A Jacobs, Litigation and Practice Under Rule 10b-5, §61.01[a], at 3-6 to 3-7 (1984) [citations omitted]; see also, id. §61.01[c] [vi] at 3-71 to 3-74.

The panel majority addressed the first relevant question and considered the literal truth of what Heublein said, but then unaccountably stopped. The majority, unlike Judge Higginbotham, acknowledged but never considered the legal effect of what Heublein admittedly knew but did not say: Heublein was aware of at least two ongoing negotiations which could have explained the trading, but made no investigation into the possibility of a leak.

The majority's limited inquiry and the rule it adopted are in total conflict with the substantial and unanimous body of case law which requires a party who speaks at all to speak the whole truth. In Kubic v. Goldfield, 479 F.2d 472, 476 n.7 (3d Cir. 1973), the Third Circuit itself said of analagous Section 17(a) of the Securities Act of 1933, 15 U.S.C. §77q(a):

> . . . the failure to state the whole truth with regard to a security is equally unlawful as the statements of half-truths or deliberate falsehoods. It is the impression created by the statement which determines whether they are misleading. [Citations omitted].*

The other circuit courts that have considered the issue are in total accord, and have uniformly rejected the rule adopted by the Third Circuit majority. See, e.g.,: (1) Panter v. Marshall Field & Co., 646

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* Emphasis added unless otherwise stated.

F.2d 271, 292 (7th Cir. 1981), cert. denied, 454 U.S. 1092 (1982) ("it is also axiomatic that once a company undertakes partial disclosure of such information there is a duty to make the full disclosure of known facts necessary to avoid making such statements misleading.");(2) First Virginia Bankshares v. Benson, 559 F.2d 1307, 1314, 1317 (5th Cir. 1977), cert. denied sub nom., Walter E. Heller & Co. v. First Virginia Bankshares, 435 U.S. 952 (1978) ("a duty to speak the full truth arises when a defendant undertakes to say anything");

(3) SEC v. Geon Industries, 531 F.2d 39, 49-50 (2d Cir. 1976);

(4) List v. Fashion Park, 340 F.2d 457, 462 (2d Cir. 1965) ("10b-5 . . .precludes not only the conveyance of half truths . . . but, as well failure . . . to disclose the full truth").

Similarly, every district court which has considered the issue has rejected the panel majority's position. See, e.g.:

(1) Connellan v. Himelhock, 506 F. Supp. 1290, 1298 (E.D. Mich. 1981) ("10b-5 creates a duty . . . to disclose the full truth");

(2) Marrero v. Banco di Roma (Chicago), 487 F. Supp. 568, 575 (E.D. La. 1980) ("when one undertakes to say anything in connection with a sale of securities, a concomitant duty arises to speak the whole truth");

(3) Smith v. Manuasa, 385 F. Supp. 443, 449 (E.D. Ky. 1974) ("the representations are not ligitimized by the absence of overt misstatements; the antifraud legislation proscribes 'half-truths' whose literal accuracy belies the clarification necessary for an informed judgment");

(4) Speed v. Transamerica Corp., 99 F. Supp. 808, 820 (D. Del. 1951), aff'd with

mod., 235 F.2d 369 (3d Cir. 1956) ("Defendants contention that only express misrepresentations or half-truths are unlawful fails to look at the fact that implied misrepresentation is just as fraudulent").

The decision in Schlanger v. Four-Phase Systems, Inc., 582 F.Supp. 128, 134 (S.D.N.Y. 1984), is illustrative of the approach other courts have taken. Under facts virtually identical to this case, the court denied summary judgment, holding that:

> This Court concludes that defendants, once having chosen to make a statement of fact, had a duty to disclose all material facts "necessary in order to make the statement made, in light of the circumstances under which it was made, not misleading."

While the panel majority specifically recognized that "[the Heublein spokesman], and other Heublein executives, clearly knew of information that might have accounted for the increase in trading" (A 17-18), the majority based its decision on the unprecedented ground that what Heublein said was

literally true because it did not know the actual reason, as opposed to several of the possible undisclosed reasons, for the increase in trading. This analysis was legally inadequate because it did not consider the Exchange's question, what Heublein admittedly knew but did not disclose or the nature of the false impression the company deliberately conveyed.[5]

The question put to Heublein by the NYSE was what could, not what would, explain the trading activity in Heublein's stock. The NYSE-Company Manual, Section A2 Part I, Timely Disclosure: Exchange Market Surveillance (1977), provides in part:

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[5] Heublein's own Guide To Compliance With The Securities Laws provides: "Regardless of the existence of a proper corporate interest in confidentiality of information, inquiries by the regulator agencies such as the [NYSE and SEC] must be answered with candor."

> If the price movement of a stock exceeds a predetermined guideline, . . . the Company may be called by its Liaison Representative in the Division of Stock List to inquire about any company developments which have not been publicly announced but which could be responsible for unusual market activity.

Heublein's statement and the majority's focus were not responsive to the NYSE question. Heublein, despite its answer, was not asked what would explain the activity; it was asked what could explain it. Thus, at trial a jury could easily find that the difference between the question posed and the answer given was a deliberate attempt "calculated to influence the public" to conclude, wrongly, that all was normal at Heublein. Texas Gulf Sulphur, supra, 405 F.2d at 862.

The NYSE specifically sought information that the panel majority conceded Heublein possessed, but which its approach permitted Heublein to conceal. The opinion rationalizes this result by emphasizing Heublein's lack of concrete knowledge, especially of any facts which indicated that there had been a leak concerning the negotiations with either Reynolds or General Cinema.

Again, the NYSE-Company Manual illustrates the fallacy underlying the majority's approach:

> At some point it usually becomes necessary to involve other persons to conduct preliminary studies or assist in other preparations for contemplated transactions . . . . Experience has shown that maintaining security at this point is virtually impossible. Accordingly, fairness requires that the Company make an immediate public announcement as soon as confidential disclosure relating to such important matters are made to "outsiders".

Thus, the Third Circuit held, without citation of a single authority, that a company can, even when, as here, at least ten outsiders have knowledge of what is occurring, act on the assumption that confidentiality has been maintained. The NYSE, with its vast practical experience and supervisory mandate under the federal securities laws, has, however, concluded that maintaining confidentiality is "virtually impossible". The NYSE approaches a company under these circumstances on the assumption that there has been a breach of confidentiality. The majority position, if permitted to stand, will deprive the public of important protections under the federal Securities Acts and the Exchange Rules and permit corporations to deal in half-truth and deception.

Judge Higginbotham succinctly identified the weakness in the majority's approach and the danger it poses to the public:

> If anything the majority's approach subjects the investing public to future voluntary misrepresentations by corporations in the midst of allegedly confidential merger discussions.
>
> So long as they remain unaware of leaks, even though there is information to leak, they can falsely assure the public that all is proceeding at a business-as-usual pace. A 27.

The public had the right to expect that Heublein was asked about possible explanations as called for by the NYSE's manual. If there was a failure to detect the subtle difference in Heublein's response, the burden should fall on the company and not on the public, where the Third Circuit has placed it.

The alternative to the panel majority's approach is obvious and had previously received unanimous judicial support: Heublein could have remained silent or have spoken

the whole truth. Heublein, however, elected to rely on misimpression and half-truth by disclosing far less than it concededly knew. Judge Higginbotham, consistent with the existing law in every other circuit, recognized the fundamental error in the panel's approach:

> . . .[T]he majority fails to distinguish between the duty to disclose and the duty not to mislead. The majority does not appreciate that this dissent stands for the simple proposition that in the face of a NYSE inquiry, Heublein could have remained silent or answered "no comment," but, by virtue of voluntarily issuing its July 14 state- ment, Heublein assumed responsibility for honoring another duty -- the duty not to mislead. A 23.

This Court should resolve the conflict among the circuits and reaffirm its long standing commitment to the broad remedial nature of the Securities Acts by granting the Writ and rejecting this complete departure from established law.

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE IMPORTANT QUESTIONS OF WHEN A DUTY TO DISCLOSE ARISES UNDER THE SECURITIES EXCHANGE ACT OF 1934

Delicate corporate negotiations cannot be conducted in a public environment. Consequently, the courts have established a rule, which Greenfield does not challenge, that no disclosure of merger negotiations is required until an "agreement in principle", or its functional equivalent, is reached if the parties maintain silence and refrain from trading. See, e.g., Reiss v. Pan American World Airways, Inc., 711 F.2d 11 (2d Cir. 1983); Staffin v. Greenberg, 672 F.2d 1196 (3d Cir. 1981).

The courts have, however, left open the crucial question of when an agreement sufficient to trigger a duty of disclosure is reached. This vital unanswered question affected two aspects of the present case: the negotiations between Heublein and

Reynolds and the termination of negotiations between Heublein and General Cinema. This Court should grant the Writ and establish a clear but flexible standard that the trier of fact can apply to determine if a discloseable event has occurred.

A. A Duty Of Disclosure Exists When The Parties Have Reached Agreement On The Elements Crucial To a Particular Transaction.

Greenfield has always maintained that Heublein and Reynolds reached a discloseable agreement as early as July 15 and certainly well before he sold his stock on July 27. This position was based on the contention that in this transaction the key elements were not price and structure, but rather the provisions designed to insure Heublein's autonomy within Reynolds and to provide financial protection for its executives.

The district court below rejected this contention, holding that there had to be

"agreement on the fundamental terms of the merger" before there could be an agreement in principle and then establishing a per se rule that these fundamental terms must always include "price and structure". Greenfield v. Heublein, Inc., 575 F. Supp. 1325, 1337 (E.D. Pa. 1983). The Third Circuit, too, placed its emphasis on price and structure:

> . . .Agreement as to price and structure provides concrete evidence of a mature understanding between the negotiating corporations. They constitute a useable and definite measure for determining when disclosures need be made. A 13.

The per se rule recognized by both courts below establishes an irrebuttable legal presumption that there can be no agreement and no duty to disclose absent agreement on price and structure. This rule is too rigid and ignores this Court's past teachings that the federal Securities

Acts must be construed "not technically and restrictively, but flexibly to effectuate [the Acts'] remedial purposes", SEC v. Capital Gains Research Bureau, 375 U.S. 180, 195 (1963), to prevent fraud and protect investors. Herman & McLean v. Huddleston, -- U.S. --, 103 S. Ct. 683, 686-690 (1983); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195, 202-03 (1976); H.R. Rep. No. 85, 73d Cong., 1st Sess. 1-5 (1933).

While price and structure are of great importance in many merger negotiations, Greenfield's point is that they do not always assume such importance, and that the policies underlying the federal Securities Acts require a standard which can accommodate the exception as well as the more usual situation. It requires little imagination to envision how the rule established below could be employed to manipulate negotiations, and thus the market, by

deliberately delaying consideration of price and structure to accomplish the parties' illegitimate ends. If negotiations are always immaterial as a matter of law and need not be disclosed until there is agreement on price and structure, insiders could reach agreement on the key issues, trade in the affected securities, and then turn to the secondary issues of price and structure after assuring themselves of a windfall.

This Court has never sanctioned judicially created rules which hamper application of the federal Securities Acts to the types of manipulative abuses Congress sought to eliminate. Here, the Court should grant the Writ and set a standard for disclosure that would permit injured shareholders, like Greenfield and the class, to rebut the primacy of price and structure under the specific circumstances of a given transaction.

B. The Panel Misapplied This Court's Decision In TCS v Northway That The Materiality Of An Event, And Thus The Duty To Disclose, Should Be Determined From The Shareholders' Perspective.

In TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976), this Court unanimously held that "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important. . . ." This Court further held that the standard for a material omission contemplates:

> . . .a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available. Id.

Despite this Court's holding that the "reasonable shareholder" and the "reasonable investor" are the touchstones in defining materiality, and hence the duty to disclose, the Third Circuit concerned itself exclusively with the company's perspective, and never mentioned, let alone considered, the investor/shareholder:

> [U]nder the facts of this case, the breakdown of the Heublein-General Cinema talks on July 23 did not materially change the relative positions of either corporation and, as a matter of law, was not a material corporate development giving rise to a duty to disclose. A 15.

While the events of July 23 may not have made a material difference in either company's position, their actual impact on the investing public was tremendous. Heublein and General Cinema had been at odds for at least six months prior to July 23. Initially, General Cinema was buying Heublein stock and driving up the

price of Heublein's shares. Later, the companies declared a truce to try to resolve their differences, and the price stabilized.

The truce ended on July 23. Based on past history, this development was clearly material to the public and to shareholders in trying to determine the future value of Heublein stock. Armed with the information the majority has held was "immaterial" as a matter of law, a reasonable shareholder would have concluded that the bidding war was going to resume and that the price of Heublein stock would again increase. It seems impossible to conclude, as the Third Circuit did, that the investment decisions made by reasonable investors would not be materially influenced by information indicating renewed buying that would increase the price of their shares. See, Brascan Ltd. v. Edper Equities Ltd, 477 F. Supp. 773 (S.D.N.Y. 1979).

This Court should grant the Writ and reaffirm that materiality, and thus the duty to disclose, must be determined from the perspective of the investor, not the company.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for A Writ Of Certiorari should be granted to review the opinion and judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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No.

IN THE

SUPREME COURT FOR THE UNITED STATES

OCTOBER TERM, 1983

BRUCE H. GREENFIELD, individually and as a representative of a class of persons similarly situated,

Petitioner,

v.

HEUBLEIN, INC.,

and

R. J. REYNOLDS INDUSTRIES, INC.,

Respondents.

CERTIFICATE OF SERVICE

It is certified that, pursuant to Rules 19 and 28 of this Court, on December 27, 1984, ALEXANDER D. BONO, ESQUIRE, a member of the bar of this Court, caused three copies of the Petition for Writ of Certiorari in the above case, together with three copies of the Appendix

to the Petition, to be served on counsel for the respondents as follows:

(1) by hand delivery to:

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